

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

ELLEN V. GRAVES)	Supreme Court No. 119977
Plaintiff-Appellant)	
)	
v.)	Court of Appeals No. 215141
)	
AMERICAN ACCEPTANCE MORTGAGE)	
CORPORATION)	Oakland County Circuit Court
Defendant-Appellee,)	No. 96-511648-CZ
)	
and)	
)	
BOULDER ESCROW, INC.)	
Counter and Cross-Plaintiff,)	
)	
and)	
)	
STEVEN A. DIAZ,)	
Counter and Cross-Defendant.)	

**AMICUS CURIAE BRIEF ON APPEAL OF
MICHIGAN LAND TITLE ASSOCIATION
ORAL ARGUMENT REQUESTED**

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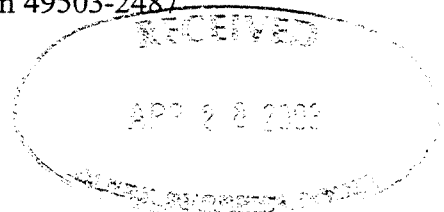


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STATEMENT REGARDING BASIS OF JURISDICTION
AND STANDARD OF REVIEW

This Court has jurisdiction over this matter pursuant to MCR 7.302(F)(1) and its Order of January 28, 2003, granting Plaintiff-Appellant Graves' Application for Leave to Appeal and vacating its prior Opinion of October 22, 2002 (**App.**). The Court of Appeals reversed the trial court's grant of Graves' Motion for Summary Disposition and denial of Defendant-Appellees' Motion for Summary Disposition. *Graves v American Acceptance Mortgage Corp, et al*, 246 Mich App 1, 630 NW2d 383 (2001) (Docket No. 215141 (**App.**)). Graves' Motion for Rehearing was denied by the Court of Appeals on July 10, 2001 (**App.**).

The Michigan Land Title Association adopts the Appellant's Statement of Standard of Review as complete and correct.

STATEMENT OF QUESTION PRESENTED

WAS THE COURT OF APPEALS CORRECT IN GIVING PRIORITY TO A MORTGAGE, THE PROCEEDS OF WHICH WERE USED TO PAY OFF THE BALANCE OF A LAND CONTRACT, OVER A PRE-EXISTING LIEN?

Court of Appeals answered “Yes.”

Plaintiff-Appellant answers “No.”

Defendants-Appellees answer “Yes.”

Michigan Land Title Association answers “Yes.”

Real Property Law Section answers “No.”

I. SUMMARY OF ARGUMENT

In its October 22, 2002, holding (now vacated), this Court concluded that a judgment of divorce that included a real property lien to secure payment of child support recorded by the Plaintiff, Eileen V. Graves, had priority under Michigan's race-notice recording acts over a later-recorded purchase money mortgage encumbering the same real property. The Michigan Land Title Association ("MLTA") urges the Court, upon reconsideration, to reject its prior holding and conclude that, under existing Michigan law, Mrs. Graves' lien is not entitled to protection under Michigan's recording acts because it never entered the chain of title to the property to which it purported to attach. That is because Mrs. Graves herself failed to take proper action to protect her rights in the property. It is, in fact, Defendant American Acceptance Mortgage Corporation ("**American Acceptance**"), a bona fide purchaser of the property whose mortgage does fall within its chain of title, that is the protected party under the recording acts. Its mortgage, not Mrs. Graves' lien, is as a matter of law entitled to priority.

MLTA submits this brief pursuant to this Court's grant of Leave to Appeal on January 28, 2003, after this Court vacated its prior Opinion of October 22, 2002, which reversed the decision of the Court of Appeals. MLTA is an association of professionals throughout Michigan who work in the title industry. Its members believe that the Court's decision in this case will have a far reaching impact upon real estate transactions in this State.¹ A reiteration of the Court's October 22, 2002, holding would materially and adversely affect the Michigan real

¹ Title insurance agents are among the many members of MLTA. Metropolitan Title Company, which acted as closing agent for the transaction giving rise to this case, is a member of MLTA. MLTA's board of directors, its officers, and its policy committee all unanimously voted to retain Warner Norcross & Judd LLP to represent it as amicus curiae in this action. Michael Hagerty, the General Counsel of Metropolitan Title Company and the attorney of record for American Acceptance, is an officer of MLTA. His vote in favor of MLTA's appearance as amicus curiae was but one out of approximately 15.

estate and title industries because, if it stands, title examiners may no longer be able to verify in any reliable manner who claims an interest in what property.

II. STATEMENT OF FACTS

MLTA is particularly concerned with an important fact that was apparently not previously developed by the parties or considered by the Court—the failure of the Plaintiff and her husband, Counter and Cross-Defendant Steven A. Diaz, to record evidence of their land contract vendees' interest.

In 1987, the Plaintiff and her husband entered into a land contract for the purchase of a residence. The land contract went unrecorded. On June 6, 1994, the Plaintiff and her husband were divorced, the husband was awarded their land contract vendees' interest in the residence, and the Plaintiff was given a lien against the husband's interest in the residence (the residence is referred to throughout this Brief as the “**Property**”) in order to secure child support and other payments. The Plaintiff recorded her lien on September 7, 1994. On that same day, the husband closed a mortgage loan on the Property from the Defendant, American Acceptance, and used the proceeds to pay off the land contract (which was then in default) and thereby obtain legal title to the Property. American Acceptance recorded its mortgage on October 5, 1994. The husband recorded his deed on October 6, 1994.²

The subsequent litigation between the Plaintiff and the Defendant concerned whether the Defendant's mortgage should have priority over the Plaintiff's lien. The Defendant argued that even though the Plaintiff's lien was recorded first, the Defendant's mortgage interest had priority because it was a purchase money mortgage. The Defendant asserted, among other things, that a

² In its prior brief, MLTA stated that both the deed and the mortgage were recorded on October 5, 1994. Counsel apologizes to the Court for this error, which does not affect the proper analysis of the case or MLTA's position.

purchase money mortgage has priority over previously-recorded interests, because without it there would be no property interest to encumber. In its October 22, 2002, decision, this Court disagreed based on the plain language of Michigan's race-notice statute, MCL 565.29, which states that:

Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall first be duly recorded.

This Court held that:

The clear import of these statutes, described as 'race-notice' statutes, is that the first instrument concerning real estate to be recorded takes priority over later-recorded instruments of whatever sort. Nowhere do these statutes exempt purchase money mortgages from the 'first-in-time' recording priority.

October 22, 2002 Opinion, p 5.

However, the Court did not seem to consider the fact that the Plaintiff's lien did not enter the chain of title to the Property because the Plaintiff (and her husband) failed to see to the recordation of their land contract vendees' interest and, hence, there was no interest of record to which the Plaintiff's lien claim could attach. Until the deed from the land contract vendor to the husband was executed and delivered on September 13, 1994, at which time the husband gave the mortgage at issue to the Defendant, the chain of title to the Property reflects only the ownership of the land contract vendor. The Plaintiff's lien, though "recorded" during the intervening time, could not have appeared in the chain of title, because neither the Plaintiff as lien claimant, nor her former husband as obligor, had any record interest in the Property.

Thus, neither the Defendant nor anyone else had constructive notice of the Plaintiff's interest (a title examiner could not reasonably be expected to discover Plaintiff's lien), and if the

Defendant took without actual or inquiry notice, the Defendant mortgagee—not the Plaintiff—qualifies for the protection of the Michigan race-notice recording acts.

While a description of the recording acts and their effect is somewhat tedious, an understanding of this process is critical to determining an appropriate outcome for this case.

III. THE OPERATION OF MICHIGAN'S RACE-NOTICE RECORDING ACTS

A. Introduction

Recording acts and the concept of a centralized system of keeping real estate records did not exist at common law. For successive conveyances of interests in the same real property, the familiar phrase “first in time is first in right” was literally true. According to the late Professor Ralph Aigler:

As between successive transfers of land by the same transferor purporting to create legal interests it was the almost invariable rule of the common law that priority in right was determined by priority in time. This followed naturally from the fact that after A had conveyed to B there was no interest left in A which he could transfer to C; first in time was first in right because there was nothing left for the second transferee. Notice and lack of notice were wholly immaterial.

When the contest was in equity between holders of competing equitable interests, priorities again were determined normally on the basis of time.

Aigler, *The Operation of the Recording Acts*, 22 Mich L Rev 405, 405-406 (1924).

The Michigan recording acts have abrogated the common law rule that priority in right must always be determined by priority in time. They require instruments involving title to real estate to be properly recorded to provide constructive notice of their contents and give the public a limited right to rely on the official record as to the status of title to real estate in Michigan.

Like most recording acts, Michigan's may be broken down into two parts: sections which establish the machinery for the recordation of instruments, and sections dealing with the effect of

recording or failure to record. Under the former part, principal clerical responsibility for the recording of instruments involving Michigan real estate is vested in the register of deeds for the county in which the real estate is located.

B. The Recording Process

1. Entry Books

When the register of deeds or his or her assistant receives an instrument for recordation, he or she must determine whether the prerequisites for recording have been met.³ If they have, he or she collects the recording fee, accepts the instrument, and notes the acceptance in an entry book. MCL 565.24 requires every register of deeds to keep an entry book of deeds and an entry book of mortgages, each page of which must be divided into six columns with the headings: "Date of Reception," "Grantors," "Grantees," "Township Where the Land Lies" (indicating the Town, Range, and Section), "To Whom Delivered (after being recorded) and Date (of delivery)," and "Fee Received." The register makes an appropriate entry in each column when an instrument is received for recording. The register is also required to keep a reception book of levies.⁴

MCL 565.25 describes how the register of deeds is to make entries in the entry books. All deeds of conveyance absolute in their terms, and not intended as mortgages for security purposes, are to be entered in the entry book of deeds. Mortgages and other deeds intended as securities, and all assignments of any mortgages or securities, are to be entered in the entry book

³ These include requirements as to both form and substance. They are set forth in MCL 565.25.

⁴ These entry books of deeds and mortgages and the reception book of levies may be combined into one book. If this is done, each page must be divided into nine vertical columns with the following headings: "Receipt Number," "Date of Receipt," "Grantors or Mortgagors or Defendants," "Grantees or Mortgagees or Plaintiffs," "Location of Land, Town, Range, Section," "Kind of Instrument," "To Whom Delivered," "Date Mailed," and "Fees Received." MCL 565.24. Statutory forms are provided for both the six- and nine-column entry books.

of mortgages. The reception book of levies must contain all levies, attachments, notices, lis pendens, sheriffs' certificates of sale, and United States marshals' certificates of sale. The record of these items in the entry and reception books is notice to all persons of the liens, rights, or interests acquired by or involved in such proceedings, and all subsequent owners take, or encumbrances attach, subject to these liens, rights, or interests.

The register must set forth in the entry book the day, hour, and minute that such instruments are received, as well as any other particulars about them (such as the existence of erasures or other unusual characteristics) in the appropriate columns in the appropriate entry books. Every such instrument is considered as being recorded at the time so noted.⁵ *Balen v Mercier*, 75 Mich 42, 42 NW 666 (1889). The entry books themselves constitute constructive notice to purchasers and refer purchasers to the actual document on file for details. *Sinclair v Slawson*, 44 Mich 123, 6 NW 207 (1880).

2. Books of Record

After an instrument has been received and noted in an entry book, it must still be formally recorded, since the entry books serve only as a record of receipt. *Id.* There are two sets of books, often referred to as "libers," that are required to be kept for the recordation of deeds and mortgages. In one set, the register records at full length all deeds, as required by the provisions of MCL 565.25, together with the certificates of acknowledgment or proof of their execution. In the other set, the register, in like manner, records instruments required to be entered in the entry book of mortgages. MCL 565.25. Hence, there are "deed libers" and

⁵ This is significant because the time at which an instrument is recorded may have a bearing on its validity against other purchasers of the same property. Because an instrument is considered as being recorded when it is noted in the entry book, a person searching the records for a parcel of property must also be sure to search the entry books. This important principle is discussed below in MLTA's argument.

“mortgage libers.” Today, records are generally preserved on microfiche. *See generally* OAG, 1955-1956, No. 2,449, p 161 (March 26, 1956). A register of deeds who uses a medium pursuant to the Records Media Act, MCL 24.401 et seq. (i.e., photograph, photocopy, microcopy, or optical storage disk), may combine all reproductions of instruments into one set of books called the “Register of Deeds Records.” MCL 565.26.

Many counties also maintain a miscellaneous book and index, which seems to be an acceptable procedure. *See Mee v Benedict*, 98 Mich 260, 57 NW 175 (1893). Pursuant to the provisions of MCL 565.381-.384, the register of deeds in each county must maintain books of record for the recording of affidavits of renewal of mortgages and is required to record such affidavits. Counties also keep other books, such as books for recording plats. *See* MCL 560.243.

On every instrument that he or she records, the register must certify the time when it was received and a reference to the book and page where it is recorded. MCL 565.27.⁶ This constitutes evidence of the instrument’s recordation. *Jakway v Jenison*, 46 Mich 521, 9 NW 836 (1881). Following recordation, the original copy of the recorded instrument is returned to the person entitled to receive it.

3. Indexes

Over time, a large number of instruments have been recorded in every Michigan county. Thus, to be useful to anyone seeking to gather information, the instruments recorded in each county must be indexed. According to MCL 565.28, every register of deeds must keep a proper general index to each set of books in which the register enters, alphabetically (by surname in the case of an individual), the name of each party to each instrument recorded, with a reference to

⁶ Local practices may vary. For example, in Oceana County, all recorded instruments are given a document number, but not a liber and page number.

the book and page where the instrument is recorded. In counties in which copies of instruments are reproduced pursuant to the Records Media Act and are combined into one set of books, the register is required to keep separate indexes of those instruments. The register must also keep a separate index for recording daily a minute of all discharges of mortgages as they are entered, together with a reference to the volume and page where recorded or entered in the margin. These indexes are the grantor-grantee and mortgagor-mortgagee indexes that evidence the chain of title to a particular piece of property (these indexes, which operate in an identical manner, are collectively referred to in this Brief as the “grantor-grantee index”). *See Edwards v McKernan*, 55 Mich 520, 22 NW 20 (1885). A county may also keep a tract index and provide abstracting⁷ services. *Thomas v Board of Supervisors*, 214 Mich 72, 182 NW 417 (1921); MCL 53.144-.151, 565.501-.502.

The indexes required by MCL 565.28 may be maintained wholly or in part by computerization. Where computerized, a duplicate index must be maintained at a separate location, and the computerized index must be protected from alteration by an unauthorized person. MCL 565.28(2)-(4).

C. The Effect of Recording or Failing to Record

1. Michigan’s Race-Notice Statute

Under the common law rule, as noted above, the doctrine of first in time is first in right applied almost without exception to successive conveyances of the same real estate, and because of this, notice of prior conveyances was a concept without relevance. Aigler, *The Operation of*

⁷ A *tract index* is an index to all instruments recorded affecting real estate which is arranged by a description of the property rather than by the names of the grantor and grantee. *Abstracting* involves the preparation of a summary of the real estate records (and other pertinent information) with respect to a particular parcel of real estate. Forty-three counties in Michigan maintain tract indexes; forty do not. Exhibit A to this Brief sets forth which counties do and which do not maintain tract indexes.

the Recording Acts, 22 Mich L Rev 405, 405-406 (1924); *see Drake v McLean*, 47 Mich 102, 104, 10 NW 126, 127 (1881); Simes, *A Handbook for More Efficient Conveyancing* 19 (1961). However, because of the need to protect persons who might be innocent purchasers of real estate that was the subject of a prior conveyance, and to make land titles public information, the common law rule of first in time is first in right was modified by the enactment of the second part of the Michigan recording acts.

There are three general types of recording acts in effect throughout the United States, each of which establishes a different rule for creating priority between conflicting interests in land. As described by Patton:

The first type of statute described above is called a race statute (the first party to record has priority); the second type is called a notice statute (a subsequent bona fide purchaser has priority over a prior unrecorded interest); and the third type is called a race-notice statute (a subsequent bona fide purchaser has priority over a prior unrecorded interest *only if* the subsequent purchaser records first).

Patton, 1 Patton on Land Titles §12 (2d ed 1957); Simes, *A Handbook for More Efficient Conveyancing* 20 (1961).

The Michigan recording acts are of the third type: race-notice. Patton, 1 Patton on Land Titles §10 (2d ed 1957); *see Crouse v Michell*, 130 Mich 347, 90 NW 32 (1902); *Drake v McLean*, 47 Mich 102, 10 NW 126 (1881). As noted by this Court in its October 22, 2002, Opinion, the pertinent section provides in relevant part:

Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

MCL 565.29.

2. Persons Protected by Michigan's Race-Notice Recording Acts

a. Statutory Provisions

Delay in recording a deed will not affect the marketability of title acquired through it, unless there are intervening rights of a third person. *See generally* Michigan Land Title Standard 3.15. However, where rights in a third person are created, to qualify for the protection of Michigan's race-notice recording acts, a person must either have a prior conveyance that is first recorded as required by statute or be a subsequent purchaser in good faith and for a valuable consideration whose conveyance is first duly recorded. MCL 565.29; *see Drake v McLean*, 47 Mich 102, 10 NW 126 (1881). The terms *purchaser* and *conveyance* are broadly defined. MCL 565.34 provides:

The term "purchaser," as used in this chapter, shall be construed to embrace every person to whom any estate or interest in real estate, shall be conveyed for a valuable consideration, and also every assignee of a mortgage, or lease, or other conditional estate.

A mortgagee is a "purchaser." *Lowry v Lyle*, 226 Mich 676, 198 NW 245 (1924). MCL 565.35 provides:

The term "conveyance," as used in this chapter, shall be construed to embrace every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding 3 years, and executory contracts for the sale or purchase of lands.

Thus, a "conveyance" includes a mortgage. *Stover v Bryant & Detwiler Improvement Corp*, 329 Mich 482, 45 NW2d 364 (1951); *Michigan Fire & Marine Insurance Co v Hamilton*, 284 Mich 417, 279 NW 884 (1938).

b. Bona Fide Purchasers

(i) Definition of the Term

(a) Generally

A subsequent purchaser in good faith and for a valuable consideration, or what is known as a bona fide purchaser for value, is one who buys or acquires some interest in property in good faith, without notice that some third party has a right to or interest in it, and pays a full and fair price for it at the time of purchase or other transaction or before he or she has notice of the claim or interest of the third person. *Black's Law Dictionary* 117 (6th ed 1990); *Michigan National Bank & Trust Co v Morren*, 194 Mich App 407, 487 NW2d 784 (1992). A bona fide purchaser takes the property or interest free from, and not subject to, the right or interest of the third parties.

(b) Good Faith

A bona fide purchaser for value must act in good faith. Determining whether a purchase was made in "good faith" does not necessarily involve questions about either the integrity of the purchaser or the moral quality of the purchaser's acts and conduct in obtaining the conveyance. *Battershall v Stephens*, 34 Mich 68 (1876). Rather, it is a question of whether the purchaser has reason to believe that some fraud or other irregularity is present in the transaction which requires further inquiry. *American Cedar & Lumber Co v Gustin*, 236 Mich 351, 210 NW 300 (1926); *Simon v Brown*, 38 Mich 552 (1878).

(c) Notice

(i) Generally

A bona fide purchaser for value purchases real estate without notice of any defects in the seller's title. *Notice* has been defined as whatever is sufficient to direct the attention of a

purchaser of realty to prior rights or equities of third persons and enable the purchaser to ascertain their nature by inquiry. *Kastle v Clemons*, 330 Mich 28, 46 NW2d 450 (1951).

There are three different kinds of notice that may affect the validity of a subsequent conveyance—actual notice, constructive notice, and what has come to be called “inquiry notice.”

(ii) Actual Notice

It has long been a rule of law in Michigan that a person who knows, at the time he or she receives a deed, that the grantor has no title or has notice that the grantor may not have title cannot be a bona fide purchaser for value under MCL 565.29, even if the real owner of the title is not known to the person. *Fitzhugh v Barnard*, 12 Mich 104 (1863). Thus, a purchaser who actually examines a prior contract made by the seller to sell the property to another is not a bona fide purchaser for value. *Lake Erie Land Co v Chilinski*, 197 Mich 214, 163 NW 929 (1917). A purchaser who has actual knowledge that someone else has a claim to or against the purchased property and that unrecorded instruments relating to the property have been executed, but fails to inquire into the nature of such a claim, may not assume that the claim does not apply to him or her and cannot be a bona fide purchaser for value. *Hosley v Holmes*, 27 Mich 416 (1873).

(iii) Constructive Notice

Constructive notice is notice that is imputed to a person concerning all matters properly of record, whether there is actual knowledge of such matters or not. See *Piech v Beaty*, 298 Mich 535, 299 NW 705 (1941); *Wild v Wild*, 266 Mich 570, 254 NW 208 (1934); cf. MCL 565.29. To give constructive notice and defeat a subsequent purchaser, a person must record an instrument of conveyance in accordance with the provisions of the Michigan recording acts; a subsequent purchaser seeking priority must do the same. In *Grand Rapids National Bank v Ford*, 143 Mich 402, 107 NW 76 (1906), the court explained that the phrase “recorded as

provided in this chapter” in MCL 565.29 means that to entitle a purchaser to protection, an instrument of conveyance must have been recorded by the register of deeds fully and exactly in accordance with the requirements for entry, recording, and indexing described in the recording acts.

Conversely, an instrument that is not recorded in accordance with the Michigan recording acts, either because it was recorded (including indexing) improperly or because it was not entitled to be recorded, may not constitute constructive notice to anyone. *See, e.g., Galpin v Abbott*, 6 Mich 17 (1858) (record of deed improperly executed does not constitute constructive notice).

Interestingly, the person presenting an instrument for recordation must bear the burden of making sure that it is properly recorded, not the register of deeds to whom it is presented. The person presenting the instrument bears the risk of any clerical errors. *Gordon v Constantine Hydraulic Co*, 117 Mich 620, 76 NW 142 (1898); *Barnard v Campau*, 29 Mich 162 (1874).

(iv) Inquiry Notice

Simply put, under what is known as the rule of inquiry notice, a buyer of property who has doubt as to the circumstances of the conveyance must ask questions. The rule of inquiry in Michigan is well settled:

If [a party] has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, and does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained.

American Cedar & Lumber Co v Gustin, 236 Mich 351, 360-361, 210 NW 300, 303 (1926) (quoting *Converse v Blumrich*, 14 Mich 109, 120 (1866)); *Kastle v Clemons*, 330 Mich 28, 46 NW2d 450 (1951); *Stamp v Steele*, 209 Mich 205, 176 NW 464 (1920).

When a purchaser receives notice of a claim, the purchaser must seek information from the party in interest, but is not required to inquire further unless the answer that he or she receives corroborates the prior statements of notice or reveals the existence of other sources of information. *Converse v Blumrich*, 14 Mich 109 (1866). To put it a different way, a person who is put on inquiry as to another's interest in realty must exercise good faith and reasonable care—but no more—in pursuing the existence of the interest which is suggested in the notice given to him or her. *Federman v Van Antwerp*, 276 Mich 344, 267 NW 856 (1936).

c. Payment of Value

Finally, the bona fide purchaser pays value for the property. The disbursement of mortgage loan proceeds constitutes payment of value. See *DeMey v Defer*, 103 Mich 239, 61 NW 524 (1894).

D. The Concept of “Chain of Title”

1. Introduction

As noted above, the Michigan recording system pertains not only to the recordation of instruments, but also requires their indexing. The grantor-grantee system of indexing generally in use throughout the State creates what is known as the “chain of title” to a particular parcel of property. From the standpoint of the person recording the instrument, therefore, it is essential that the title be properly indexed and fall within the chain of title. Otherwise, absent actual notice, a bona fide purchaser may take free of any claim evidenced by the instrument.

Professor Cribbet illustrates the chain of title concept:

The chain of title concept is illustrated by the following case. *A* leases to *B*, who neither records nor takes possession. *B* assigns the lease to *C* who records the assignment but does not enter into possession. *A* then gives a warranty deed to *D*, a b.f.p., who records. *D* will take free of the lease, even though its assignment was recorded, because it is outside the chain of title. In using the

grantor-grantee index, *D* would find no prior conveyance indexed under the name of *A* as grantor. How could he ever discover the assignment since it would be indexed under names that are strangers to his chain of title? A contrary holding would make the system unworkable since no one could search every document in the recording office.

Cribbet, *Principles of the Law of Property* 291 (2d ed 1975). As this Court stated as early as 1905: “[t]he record of deeds not in [the] chain of title [is] no notice . . .” *Meacham v Blaess*, 141 Mich 258, 104 NW 579 (1905).

2. “Running the Chain of Title”

The chain of title begins neither on the date an instrument is recorded nor on the date an unrecorded instrument is executed, but instead on the date a recorded instrument is executed. This distinction is very important to the doctrine of constructive notice. The rule in the majority of jurisdictions, including Michigan, is that a purchaser need not search the records for instruments given by an owner before the date of the conveyance (not the date of recordation) by which the owner obtained title to the property. Patton & Palomar on Land Titles 235, § 70 (3d ed 2002); *Heffron v Flanigan*, 37 Mich 274 (1877) (holding that a title searcher must examine the records from the date of delivery of a recorded deed). Once again, Professor Cribbet explains the concept:

A title searcher tracing title by means of the public records employs an official index of names, called the Grantor-Grantee Index. Suppose, for example, that the United States Government Records show that the United States sold a particular tract of land to John Jones on March 15, 1840. The title searcher will turn to the Grantor Index, which is arranged alphabetically, and, beginning with the date of March 15, 1840, he will look under the ‘J’ for any deeds or mortgages made since March 15, 1840, by John Jones. Naturally, he would not expect to find any deeds or mortgages of that land made by Jones prior to March 15, 1840, because Jones did not acquire title until that date. . . . Suppose he finds that John Jones conveyed the land to Joseph Smith by deed dated September 10, 1860, and recorded November 1, 1860. He will now look under the letter ‘S’ for any deeds or mortgages made by Smith *on or after*

September 10, 1860, the date when Smith acquired title. This process is repeated until he has brought the title down to date. This process is called running the chain of title.

Cribbet, Principles of the Law of Property 216-217 (2d ed 1975) (emphasis added). Under this rule, American Acceptance is within the chain of title to the Property (American Acceptance's mortgage was recorded on October 5, 1994; Mr. Diaz's recorded deed bears a date of September 13, 1994), but Mrs. Graves' lien is not (the land contract was never placed of record).

IV. ARGUMENT

A. Mrs. Graves' Hardship is Self-Created

For the reasons set forth below, Mrs. Graves is not entitled to the protection of Michigan's recording acts in the face of a bona fide purchaser like American Acceptance. MLTA urges this Court to so hold. However, there is a more viscerally compelling reason for this Court to hold against Mrs. Graves—whatever hardship she may suffer was self-created.

Mrs. Graves was a licensed real estate professional.⁸ As a licensed real estate professional, she had to know about the importance of recording documents to protect one's title. Yet, after she and her husband purchased the Property on land contract, they failed to record their contract or any memorandum thereof.⁹ This defies all logic.¹⁰

⁸ Her Michigan Department of Consumer and Industry Services license number was 6501258823.

⁹ Under MCL 565.354, land contracts are entitled to be recorded. However, the custom throughout Michigan is to record memoranda of land contracts. *See generally* OAG, 1985-1986, No. 6,319 (November 1, 1985), p 2. Mrs. Graves and her husband did neither.

¹⁰ A number of reasons might cause a person to fail to record their interest in land, some innocent, others less so. These include: ignorance, negligence, a desire to defer the Michigan and State transfer taxes, MCL 207.505 and 207.526 (if they were not payable by their seller), an attempt to minimize property tax assessment increases, or a desire to keep their interest in the property confidential. It is hard to imagine a licensed real estate professional being guilty of ignorance or negligence in connection with the fundamental concept of recordation. The failure of Mrs. Graves and her husband to record must, therefore, have been for some other reason.

Additionally, although Mrs. Graves and her husband were divorced on June 6, 1994, and certain instruments arising out of their divorce were recorded shortly thereafter, for some unexplained reason, Mrs. Graves waited until the day of her former husband's mortgage closing with American Acceptance to record her lien (it may be relevant that the land contract by which Mrs. Graves and her former husband purchased the Property was in default and would have been forfeited along with Mrs. Graves' lien but for the purchase money provided by American Acceptance). As noted below, due to the recordation backlog in Oakland County, while the lien would have been discovered by a title examiner had it been recorded within the chain of title on a timely basis, the delay of the lien's recordation until the day of the American Acceptance mortgage closing made it undiscoverable. It is axiomatic that American Acceptance would not have funded the loan had it known that its mortgage would be subordinate to a divorce lien.

This case would never have arisen if the land contract, or a memorandum thereof, had been recorded. And, it might not have arisen if Mrs. Graves' lien had been placed of record promptly following her divorce. If Mrs. Graves had taken the rudimentary steps that any reasonably careful person takes, her lien would have entered the chain of title and been discovered by a title examiner. It is disingenuous for Mrs. Graves to now try to hide behind the very recording acts that she twice disregarded. In this equitable action, she should be estopped to seek their protection.

B. Mrs. Graves' Lien is Not Entitled to Protection Under The Michigan Recording Acts Because Her Lien Was Not Recorded in Accordance with Michigan Law.

MLTA supported Defendant, American Acceptance, in its Motion for Rehearing because the Court failed to consider a critical issue in the case—the effect of Mrs. Graves' recording her lien outside of the chain of title to the Property. Any conveyance of Michigan real estate not

recorded in accordance with Michigan law is void against subsequent bona fide purchasers. MCL 565.29; *Grand Rapids National Bank v Ford*, 143 Mich 402, 107 NW 76 (1906). Because Mrs. Graves' lien was recorded outside the chain of title and thus not in accordance with Michigan law, it is void against American Acceptance, a subsequent bona fide purchaser.

1. Because Mrs. Graves' Lien Was Outside of the Chain of Title, its Recordation Does Not Constitute Constructive Notice

As described in detail above, Michigan law requires each register of deeds to keep a general index with an alphabetical list of the names of each party to each instrument recorded. MCL 565.28. This official indexing system is called a grantor-grantee index. This indexing system creates what is known as a "chain of title." The chain of title shows record ownership of interests in real property as ownership passes from grantors to grantees. MCL 562.28. The recording of an instrument within the chain of title has the effect of giving constructive notice to all persons of the rights acquired by or through such instruments.

On the other hand, the recording of instruments that fall outside of the chain of title to the property in question does not serve as constructive notice to subsequent purchasers. *Meacham v Blaess*, 141 Mich 258, 104 NW 579 (1905) (holding that deeds not in the chain of title are not constructive notice); *Stead v Grosfield*, 67 Mich 289, 34 NW 871 (1887) (stating that if a second mortgagee had to search outside of the chain of title, "our recording law, so far as notice is concerned, would prove a snare, instead of protection to innocent parties"). Indeed, to hold otherwise would defeat the rationale of the recording acts—to protect subsequent purchasers. See generally *Edwards v McKernan*, 55 Mich 520, 22 NW 20 (1885); Johnson, *Purpose and Scope of Recording Statutes*, 47 Iowa L Rev 231, 232 (1962) (stating that generally, the purpose of recording acts is to provide a convenient method to ascertain the ownership of real property, by

providing admissible evidence of title, and protecting the interests of both the subsequent purchasers who research the records and owners who record their interests in a timely manner).

Absent some type of actual notice, a purchaser of real property has no duty to make inquiry as to deeds and conveyances outside his or her chain of title. To impute such notice is “wholly inconsistent with equitable principles.” 66 Am Jur 2d, Records and Recording Laws § 98 (May 2002). A contrary holding would make the system unworkable and nearly impossible, as it is unreasonable to suggest that every purchaser of property should search every document in a recording office. Cribbet, *Principles of the Law of Property* 225 (2d ed 1975); Power, *Killam v Texas & Gas Corp: A Portrait of Uncertainty for Title Examiners and Mineral Interest Owners*, 45 Ark L Rev 679 (1992) (“To burden one with notice of all instruments outside the chain of title simply because they are recorded would require the purchaser to examine each entry in every book of recorded instruments to ensure that no such instruments affecting ownership exists. Such a result would be costly, inefficient, and unduly burdensome to those real estate transactions where a wild deed is discovered.”)

Here, neither Mrs. Graves nor her husband had any record interest in the Property because they never recorded their land contract. “It is safe to conclude that any time a document affecting title is left unrecorded, subsequent transactions based on that document will be out of the chain of title and hence will not give constructive notice to a purchaser from the original owners.” Cribbet, *Principles of the Law of Property* 225 (2d ed 1975). Because the land contract was never recorded, there is no record evidence of Mrs. Graves’ lien within the chain of title to the Property. Because Mrs. Graves’ lien was outside of the chain of title, neither

American Acceptance nor any other party had constructive notice of her interest in the Property. Under MCL 565.29, Mrs. Graves' lien was, in effect, unrecorded.¹¹

2. Mrs. Graves' Lien Was Outside of the Chain of Title, Because American Acceptance Could Not Have Found the Lien in its Title Search

American Acceptance could not have found Mrs. Graves' lien even if it had been properly recorded. Mrs. Graves presented her lien for recordation on September 7, 1994, the morning of Mr. Diaz's closing on the Property. In Oakland County, as in most counties, there is a delay between the time of presentation of an instrument for recordation and the time the instrument is indexed in the grantor-grantee or tract index. Ideally, the delay should be no greater than 24 hours, to provide subsequent purchasers maximum protection under the recording acts. In Oakland County, however, the delay in time from presentation of an instrument for recordation to the actual indexing of an instrument is over one month.¹²

As noted above, Michigan law addresses this problem by requiring each register of deeds to maintain an entry book. MCL 565.25. The maintenance and use of an entry book is critical to

¹¹ An *unrecorded* instrument clearly will not constitute constructive notice of that interest to a subsequent purchaser. Michigan law is settled that if a party's interest has not been recorded, a subsequent bona fide purchaser who has relied upon the public records cannot be held to have constructive notice of the first party's interest. MCL 565.29; *Burns v Berry*, 42 Mich 176, 3 NW 924 (1879); *Lakeside Associates v Toski Sands*, 131 Mich App 292, 346 NW2d 92 (1983) ("If the intentions of the original contracting parties are not reflected in the public record, a subsequent bona fide purchaser who has relied upon the public record cannot be bound by those unrecorded intentions"); *Haener v Robbins*, No 232486, 2002 WL 31160294, *3 (Mich Ct App, Sept. 27, 2002) (holding that where a survey was never recorded, the party charged with the responsibility of searching the record could not be "penalized for something they could not have known.").

¹² Instruments presented for recordation on February 21, 2003, at the Oakland County Register of Deeds were not placed into the computer indexing system until April 2, 2003. Telephone Interview with Larry Mitchell, Chief Deputy Register of Deeds, Oakland County Register of Deeds (April 2, 2003).

a workable recording system.¹³ As soon as an instrument is presented for recordation, it must be placed in the entry book so that title examiners may find the instrument between the time it is presented for recordation and the time it is placed in the indexing system. *Sinclair v Slawson*, 44 Mich 123, 6 NW 207 (1880). Justice Cooley's holding in *Sinclair v Slawson* is remarkably apropos to this case: "Considerable time must elapse between the entry and the actual copying of the instrument upon the record book, and during all [that] time the *entry book will constitute the record*, and will be the means whereby third parties will be notified of conveyances." *Id.* at 127.

Oakland County, however, where Mrs. Graves presented her lien for recordation, does not maintain an entry book.¹⁴ Because of the lack of entry books and the long delay in indexing, for over one month from the presentation of her lien for recordation, no one, including American Acceptance, could have found Mrs. Graves' lien in a title search. For this reason, too, the lien was outside of the chain of title to the Property, and since the land contract was not recorded, a

¹³ In fact, an instrument is technically deemed "recorded" only at the time it is noted in the statutorily required entry book. MCL 565.25(4).

Every register of deeds is required to keep an entry book of deeds, and an entry book of mortgages, each page of which shall be divided into six columns with the following headings: Date of reception; Grantors (or Mortgagors); Grantees (or Mortgagees); Township where the lands lie; To whom delivered after being recorded; Fees received. In the entry book of mortgages he shall enter all mortgages and other instruments intended as securities, and all assignments of any such mortgages or securities; and he shall note in such books the day, hour and minute of the reception, and the other particulars, in the appropriate columns, in the order in which such instruments are respectively received; and every such instrument shall be considered as recorded at the time so noted. . . . These instruments are afterwards to be recorded at full length, in proper books procured for the purpose . . . and a general index made of them all, with the names of the parties alphabetically arranged.

Sinclair v Slawson, 44 Mich 123, 126, 6 NW 207 (1880) (Cooley, J.).

¹⁴ Telephone Interview with Larry Mitchell, Chief Deputy Register of Deeds, Oakland County Register of Deeds (April 2, 2003).

title examiner would not have even a hint that Mrs. Graves claimed any interest in the Property. This point raises an interesting question. Which party bears this risk of delay in indexing? Analogous case law suggests that this risk should be borne by Mrs. Graves.

3. Mrs. Graves Bears the Risk of Adverse Effects Caused by the Delay in Indexing her Lien

Mrs. Graves should carry the risk of a delay in indexing her lien, even though it may have been caused by the Oakland County Register. While this precise issue has not been addressed in Michigan, analogous case law strongly suggests that the party that presents the instrument for recordation should bear the risk of any adverse effects caused by a delay in indexing.

For example, where a mistake occurs in a recording, a subsequent purchaser has the right, in the absence of actual notice of the mistake, to rely on the records as showing the exact facts. *Barnard v Campau*, 29 Mich 162 (1874) (“An equitable construction cannot be put upon such laws by which they may be made to embrace cases not within them, or by means of which they may be made to give constructive notice of things the records do not show. And . . . if a mistake [is] made in recording . . . a subsequent purchaser has a right to rely on the records as showing the exact facts”). Thus, one may not be bound by the claimed rights of persons whose names are omitted from or incorrectly placed in the records. Likewise, a purchaser is not put on notice where there are misdescriptions of property in the records. *Barrows v Baughman*, 9 Mich 213 (1861) (holding that where a description of land in a recorded mortgage was incorrect, the record was not notice of the encumbrance to subsequent purchasers).

Michigan courts have afforded similar treatment to cases where a deed was recorded in the wrong book at the register of deeds. In *Grand Rapids National Bank v Ford*, 143 Mich 402, 107 NW 76 (1906), for example, the court considered whether a warranty deed conveyed as security was effective even though improperly recorded in the book of deeds, instead of the book

of mortgages. The court found that the purpose of the recording law is to represent the true state of title. Further, if a party fails to comply with the plain requirements of the Michigan recording acts, the subsequent purchaser in good faith is protected, and is not charged with constructive notice. The court in *Grand Rapids National Bank* held that a conveyance recorded elsewhere than in the place designated is void against good faith purchasers. *Id.*; see also *Allen v Bay County Road Commission*, 10 Mich App 731, 160 NW2d 346 (1968) (holding that a drain easement recorded in the drain commissioner's office and not the register of deeds was not notice to subsequent purchasers); *Williams v Hyde*, 98 Mich 152, 57 NW 98 (1893) (holding that because the filing of timber as a chattel is improper, as an interest in timber is realty, recording such an interest in the town clerk's office is no notice of such interest to subsequent purchasers).

As these cases hold, the party responsible for recording an instrument must bear the risk of mistakes made in recordation. Although this case is not factually identical to the aforementioned cases, there is a fundamental similarity—a subsequent purchaser could not have possibly located information through the indexing system. Furthermore, the result in this case should be based upon the same important policy the above cases were decided upon—to protect subsequent purchasers. This policy is only served in the instant case if Mrs. Graves is held responsible for any error or oversight in the recording of her lien, made by her or any other party. Otherwise, innocent purchasers will not be protected, but will instead be harmed by Michigan's system of recording. In accordance with established law and policy, a delay in indexing is an error that must be borne by Mrs. Graves.

C. American Acceptance's Mortgage is Entitled to Priority Under the Michigan Recording Acts Because it was Recorded in the Chain of Title

American Acceptance recorded its mortgage in accordance with the Michigan recording acts, and as a subsequent purchaser, must be awarded full protection under Michigan's recording acts. American Acceptance recorded its mortgage in accordance with Michigan's recording acts because it falls within the chain of title to the Property. American Acceptance is a bona fide purchaser because it took for value and was without actual, constructive or inquiry notice of Mrs. Graves' lien. The fact that its mortgage was recorded before the warranty deed does not remove the mortgage from the chain of title. It is well settled hornbook law that subsequent purchasers must search the chain of title from the date a recorded instrument was executed, not the date it was recorded.

1. The Chain of Title Begins on the Date a Recorded Instrument Was Executed, Not the Date it was Recorded

Here, because Mr. Diaz's deed was recorded, a subsequent purchaser to American Acceptance's mortgage must search title from the date that the deed was executed, September 13, 1994. Because American Acceptance's mortgage was recorded after that date of execution, it would certainly be found in the chain of title.¹⁵

In the factually similar case of *Higgins v Dennis*, 74 NW 9 (Iowa 1898), the Iowa Supreme Court discussed and evaluated this rule. The sole issue was whether a title searcher was charged with knowledge imparted by the recording of a mortgage before the recording of the deed that placed title in the mortgagor. First, the court distinguished its case from those cases addressing after-acquired title issues. As in our case, the mortgagor in *Higgins* had already obtained title to the property, so there was not an issue of after-acquired title. In regard to the

¹⁵ Note that this rule is only applicable to recorded instruments. A subsequent purchaser would only discover the deed's execution date by examining the recorded deed.

date from which a purchaser must examine the record, the court held that “such transactions as those under consideration are of common occurrence, and it is not requiring too much of searchers for the chain of title that they shall not stop at the day and hour at which the evidence of title was filed for record, but go back to the date of that title *as shown by the record*. Such a rule is in harmony with reason.” *Id.* at 11.

And, this rule helps subsequent purchasers to discover interests that may have been issued by the grantor after obtaining title but before recording title. Additionally, it places no more of a burden on subsequent purchasers because they need only rely on instruments *in the record* to determine when title was obtained. Based on information derived from examining the chain of title, the purchaser knows from what date to start its title search. This is the only logical interpretation of the law. Otherwise, the grantor could, after obtaining title but before recording its deed, execute other mortgages or encumbrances on the property. A subsequent purchaser, relying solely on the date of recordation, would never find record of such interests.

2. Mrs. Graves’ Lien is Not Affected by this Rule and Remains Outside of the Chain of Title

This rule does not change the fact that Mrs. Graves’ lien is outside of the chain of title. The instrument from which Mrs. Graves’ lien was derived, the land contract, was never recorded. Thus, there is no recorded instrument from which to search, regardless of whether it is searched by the date of recordation or execution. The mere fact that the deed from the land contract vendor to Mr. Diaz referred to the land contract does not change this result. The reference to the land contract in the deed may require further inquiry on the part of a title examiner (this concept is discussed below), but is not equivalent to recording the land contract, does not bring Mrs. Graves’ lien within the chain of title, and does not create constructive notice.

D. Even if Mrs. Graves' Lien had been Recorded in the Tract Index Alone, it Would not Constitute Constructive Notice

The grantor-grantee indexing system is the only official recording system within Michigan. MCL 565.28. Yet, Mrs. Graves argues that because her lien could be found in the tract index, subsequent purchasers are charged with notice of it. Plaintiff-Appellant's Answer to Defendant-Appellee's Motion for Re-Hearing at 8. First, as noted above, because of indexing delays in Oakland County, Mrs. Graves' lien *could not* have been found on September 13, 1994, in *either* the grantor-grantee *or* the Oakland County tract index.¹⁶ It wasn't there. That, notwithstanding, Mrs. Graves' argument is a red herring, and it must fail because a tract index is not an official, mandatory index, but simply a permissive index, used only for convenience.

Even assuming that Mrs. Graves' lien had been placed in the tract index only, an instrument recorded in a tract index does not provide constructive notice to a subsequent purchaser. A purchaser need only "inspect the index book which the register of deeds is required by law to keep and does keep." *John Widdicomb Co v Card*, 218 Mich 72, 75-6, 187 NW 308 (1922). In Michigan, the only index the law requires is the grantor-grantee index. MCL 565.29. Unlike the grantor-grantee index, a tract index is permissive, and in fact, a majority of counties do not maintain a tract index.¹⁷ A tract index is simply for the convenience of the owners and prospective purchasers of the land in a county. *See Thomas v Board of Supervisors of Wayne County*, 214 Mich 72, 81 (1921). Further, a tract index is just a matter of local concern, provided simply as a service to the people of a county that chooses to maintain the tract index. *Id.*; *see also Skidmore, Owings and Merrill v Pathway Financial*, 527 NE 2d 1033 (Ill App Ct 1988) (holding that generally, recording outside of the grantor-grantee index, such as in a tract index, is

¹⁶ Telephone Interview with Larry Mitchell, Chief Deputy Register of Deeds, Oakland County Register of Deeds (April 2, 2003).

¹⁷ See Exhibit A attached to this Brief.

recording merely for convenience.)¹⁸ Because not all counties maintain a tract index, a contrary result would lead to inconsistent title search standards throughout Michigan. As the purpose of the recording acts is to protect subsequent purchasers, forcing differing title search standards in each county within Michigan is counterproductive to this objective.

E. American Acceptance Exercised Due Diligence to Verify that Encumbrances, Such as Mrs. Graves' Lien, Did Not Exist Against Title to the Property

A copy of the deed given in fulfillment of the original land contract is attached to this Brief as Exhibit B. It states, in relevant part: "subject to EASEMENTS AND RESTRICTIONS OF RECORD. ALSO SUBJECT TO ACTS OR OMISSIONS OF GRANTEE SINCE 8-25-87 BEING THE DATE OF A CERTAIN LAND CONTRACT IN FULFILLMENT OF WHICH THIS DEED IS GIVEN."

¹⁸ The Court should note that there is one Michigan case and one federal case decided under Michigan law that hold that a title searcher has constructive notice of items that can be found in a county's tract index. These cases are poorly reasoned and should be rejected. In *Schepke v Dept. of Nat. Resources*, 186 Mich App 532, 464 NW2d 713 (1990), the court decided whether a party was equitably estopped from claiming title to mineral rights where no reservation of these rights were recorded, but where a lease, lease assignment, and lease discharge were recorded in a tract index. The court found, with little discussion, that the lease, lease assignment, and lease discharge provided sufficient notice to a subsequent purchaser to examine other potential mineral rights. The court failed to mention, however, how a subsequent purchaser would go about finding such lease, lease assignment and lease discharge. It summarily stated that because such instruments were "recorded," subsequent purchasers must take notice of them. While the only logical explanation of such a result is that the subsequent purchaser had actual notice of the interest, the court did not discuss such facts.

Likewise, in *Cipriano v Tocco*, 772 F Supp 344 (ED Mich 1991), the court relied on the poorly reasoned case of *Schepke*, and found that a prudent subsequent purchaser must search the tract index "because a mere search of the grantor/grantee index will not necessarily reveal whether [the grantors] themselves held valid title to the property." *Id.* at 348. However, in *Cipriano*, the title searcher never conducted a title search or obtained a title insurance policy prior to purchasing the property at a tax sale despite explicit warnings by the IRS to inform purchasers of property that they should examine title to the property they are purchasing. *Id.* at 346. The court decided, based in part on this fact, that the purchaser should not get protection under the recording acts. To the contrary, in our case, American Acceptance did everything that it could to search title to the Property. Mrs. Graves' lien could not be found in any index, despite its diligent search. As a federal case construing Michigan law, *Cipriano* is not binding on this Court.

No one contends that American Acceptance had actual notice to Mrs. Graves' lien. MLTA has demonstrated that the recording acts, and applicable case law, do not charge it with constructive notice. Does this language place American Acceptance, which MLTA believes had not been presented with a copy of the land contract prior to the mortgage closing, on inquiry notice of Mrs. Graves' lien? Probably not, because it provides American Acceptance with no notice of the possibility that Mrs. Graves might have a claim. Nothing on the face of the deed would cause a person to know that she existed, much less that she had a claim to the Property.

American Acceptance took all reasonable measures to verify that Mr. Diaz had not committed "acts or omissions" which would cloud title to the Property. That is all it was required to do.¹⁹ Before issuing Mr. Diaz's mortgage, American Acceptance hired Metropolitan Title Company to conduct a title search of the Property. Because Mrs. Graves' lien was outside the chain of title, the title search showed no encumbrances on the Property. To fulfill any duty of inquiry required by law, as discussed above, Metropolitan Title Company required Mr. Diaz to complete and sign an affidavit listing other encumbrances on the Property. A copy of that Affidavit is attached to this Brief as Exhibit C. In his Affidavit, Mr. Diaz denied knowledge of encumbrances on the Property. Specifically, Mr. Diaz answered "None" when asked to confirm that, "The Affiant has no knowledge of any other matters affecting the title including but not limited to: mortgages, liens, land contracts, options or other encumbrances other than is reflected" on Metropolitan Title Company's commitment. See Exhibit C attached to this Brief. Based on Metropolitan Title Company's title search and Mr. Diaz's Affidavit, American Acceptance properly issued its mortgage.

¹⁹ *Federman v VanAntwerp*, 276 Mich 344, 267 NW 856 (1936) (All that is required of a party who is put on inquiry is good faith and reasonable care).

American Acceptance did not have an obligation to inquire further into any possible encumbrances on the Property. Here, the only document that American Acceptance was obligated to review, the warranty deed from the land contract vendor to Mr. Diaz, did not provide notice or even a suggestion of Mrs. Graves' lien.

Mrs. Graves suggests that American Acceptance should have examined the land contract. But why? Based on this limited information in the warranty deed and its lack of any suggestion of irregularity, American Acceptance's duty to examine that land contract is highly questionable. Even more questionable is its duty to go a step further to seek out any encumbrances based on Mrs. Graves' status as a land contract vendee as evidenced by the land contract. Inquiry notice only requires pursuit of matters specifically suggested, not those that could possibly exist. While inquiry notice is one of degree, it is doubtful that a deed referencing a land contract is close enough in proximity to constitute inquiry notice of an interest that may or may not be derived from that land contract, where there has been no suggestion that anyone else might have been a party to that land contract.²⁰ This is especially true when that interest is outside of the chain of title. To hold American Acceptance to this elevated standard of inquiry is at odds with reason and law. *See Calvert v Bowman*, 271 Mich 229, 259 NW 896 (1935) (holding that a grant in a deed describing the grantor as a trustee did not constitute inquiry notice so that the purchaser

²⁰ The rule is this, and we apprehend that this, with few exceptions, is all that the courts have intended, when speaking of a notice that should put a party upon inquiry: that where a party, at the time of taking a subsequent conveyance or mortgage, receives direct and express notice that a certain other party holds a prior mortgage, or other lien upon the property included in such subsequent conveyance; or if such prior mortgagee or grantee is in the possession of the property conveyed; or if such prior mortgage or other conveyance has been recorded, it is sufficient to put such subsequent mortgagee or grantee upon inquiry as to the extent of the claim or lien of such prior mortgagee or grantee, and in that case he would take subject to such prior lien.

Doyle v Stevens, 4 Mich 87 (1856).

must research the grantor's authority to act or otherwise examine the grantor's powers where the purchaser had diligently examined the record). And, in an analogous case, a creditor taking a deed from a purchaser in possession under a land contract was not required to inquire as to whether there had been a prior assignment of that land contract interest simply because the information the creditor received about the amount due on the land contract and the actual amount due were not the same. *Holly Lumber & Supply Co v Friedel*, 271 Mich 425, 261 NW 70 (1935).

Finally, even if American Acceptance did have a duty to examine the unrecorded land contract (which MLTA strongly urges this Court to conclude that it did not), and based on that examination, discovered the fact that Mrs. Graves was once one of the land contract vendees, because Mrs. Graves did not see to the recordation of the land contract and only recorded her divorce lien on the date of the American Acceptance closing, American Acceptance would still not have then discovered Mrs. Graves' lien. "When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, *and fails to make them*, he is chargeable with notice of what such inquiries and the exercise of ordinary caution *would have disclosed*." *Kastle v Clemons*, 330 Mich 28, 31 (1951) (emphasis added). First, American Acceptance did not fail to make inquiry into the rights of others, as it exercised due diligence in searching title to the Property through the official grantor-grantee index and securing an affidavit from Mr. Diaz. Second, as discussed above, Mrs. Graves' lien was not "recorded" or, at the very least, was outside of the chain of title because of Oakland County's failure to maintain an entry book.

Thus, despite its diligent efforts, American Acceptance had no way to find Mrs. Graves' lien. No title search "would have disclosed" her interest.²¹

F. MLTA Supports American Acceptance's Position That a Purchase Money Mortgage Should be Entitled to Priority

MLTA does not believe it will be necessary for the Court to consider the possible priority of the American Acceptance mortgage as a purchase money mortgage, since the mortgage has priority under the recording acts. However, should the Court wish to consider this issue, MLTA would like to be on record in support of American Acceptance's position on this issue.

Mrs. Graves and the Real Property Law Section of the State Bar of Michigan seek to blur the distinction between land contracts and mortgages, asserting that they are but two sides of a single coin. This is not, however, the case. A mortgage in Michigan is a lien against someone else's real property. A land contract is an executory agreement for the purchase and sale of one's own real property. A land contract may call for the payment of the purchase price in one or more installments. However, because the seller always retains legal title to the property until he or she conveys it by deed, a land contract is not a mortgage. Blurring the distinction between land contracts and mortgages would ignore the important distinctions between the two that have been emphasized by this and other courts. For example, an equity of redemption exists under a mortgage. *Gerasimos v Continental Bank*, 237 Mich 513, 212 NW 71 (1927). But, no equity of redemption exists under a land contract. *Rothenberg v Follman*, 19 Mich App 383, 172 NW2d 845 (1969).

²¹ See also *American Federal Savings & Loan Assoc v Orenstein*, 81 Mich App 249, 252, 265 NW2d 111 (1978) (holding a different standard of inquiry for cases "in which a title defect would prevent a diligent title searcher from discovering the deed" and cases "in which the deed would have been discovered").

Once the distinction between land contracts and mortgages is noted, it is easy to see that the American Acceptance mortgage is a purchase money mortgage, since its proceeds were used to pay the purchase money for the Property to the seller of the Property. While Michigan courts do not appear to have addressed this specific subject, the courts in other states have held that such purchase money mortgages are entitled to priority over other liens against the same property arising from the acts of the same mortgagor as a result of the “but for” rule. Under this rule, courts recognize that “but for” the purchase money loaned under the purchase money mortgage, title to the property would never have vested in the mortgagor and all the other liens would not have attached to the property. Hence, the purchase money mortgage is entitled to priority. This concept, and supporting law, is set forth in detail in the Restatement of Property (Third) Mortgages, § 7.2.

MLTA does not quarrel with the Land Contract Mortgages Act, which was adopted in 1998. MCL 565.356 *et seq.* That Act simply does not apply to a divorce lien created in 1996, two years before the adoption of the Act. *Hughes v Judges’ Retirement Bd*, 407 Mich 75, 282 NW2d 160 (1979); *Rossow v Brentwood Farms Development*, 251 Mich App 652, 662, 651 NW2d 458 (2002) (“Statutes are to be applied prospectively unless the Legislature’s intent for retroactive application is clear.”).


V. CONCLUSION

In her briefs to this Court, Mrs. Graves suggests that any relief for Defendant American Acceptance, and others similarly situated, for the hardship caused by the recording process lies with the legislature, not in the courts. But, Mrs. Graves has it backwards.²² She cannot in this case prevail under the recording acts. American Acceptance, not Mrs. Graves, is entitled to the protection of the Michigan recording acts. Under the facts of this case and existing law, Mrs. Graves' lien is, as a matter of law, junior to the American Acceptance mortgage. Accordingly, for all of the foregoing reasons, MLTA requests that this Court reject its prior holding and conclude that Mrs. Graves' lien is not entitled to protection under Michigan's recording acts.

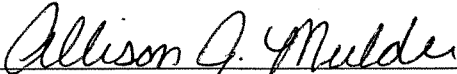
²² Although Mrs. Graves' plight is wholly self-created and should not elicit any sympathy from this Court, one can think of a number of ways the recording acts could be improved legislatively, possibly even in a manner that would better protect persons like Mrs. Graves. *See* Cribbet, *Principles of the Law of Property* 253-263 (2d ed 1975). Creation of a uniform, State-wide system of official tract indexes is one. *See* Cameron, *Michigan Real Property Law: Principles and Commentary* § 11.29 (1st ed 1985; 2d ed 1993). But, as Mrs. Graves notes, improving Michigan's recording system is a matter for the legislature.

Respectfully submitted,
WARNER NORCROSS & JUDD, LLP

Dated: April 28, 2003

By: 
John G. Cameron, Jr. (P28751)

and

By: 
Allison J. Mulder (P64769)

Business Address:
900 Fifth Third Center
111 Lyon Street, NW
Grand Rapids, Michigan 49503

Attorneys for Amicus Curiae
Michigan Land Title Association

A

Tract Index by County	
Alcona	Yes
Alger	Yes
Allegan	No
Alpena	Yes
Antrim	Yes
Arenac	No
Baraga	Yes
Barry	Yes
Bay	No
Benzie	No
Berrien	No
Branch	No
Calhoun	No
Cass	No
Charlevoix	Yes
Cheboygan	No
Chippewa	No
Clare	Yes
Clinton	Yes
Crawford	No
Delta	Yes
Dickinson	Yes
Eaton	No
Emmet	No
Genesee	No
Gladwin	Yes
Gogebic	Yes
Grand Traverse	Yes
Gratiot	No
Hillsdale	Yes
Houghton	Yes
Huron	No
Ingham	No
Ionia	Yes
Iosco	Yes
Iron	No
Isabella	Yes
Jackson	Yes
Kalamazoo	No
Kalkaska	Yes
Kent	No
Keweenaw	Yes
Lake	Yes
Lapeer	No

EXHIBIT A

Tract Index by County	
Leelanau	No
Lenawee	No
Livingston	Yes
Luce	Yes
Mackinac	No
Macomb	Yes
Manistee	No
Marquette	Yes
Mason	Yes
Mecosta	No
Menominee	Yes
Midland	No
Missaukee	No
Monroe	No
Montcalm	Yes
Montmorency	Yes
Muskegon	No
Newaygo	No
Oakland	Yes
Oceana	No
Ogemaw	Yes
Ontonagon	No
Osceola	Yes
Oscoda	Yes
Otsego	No
Ottawa	Yes
Presque Isle	Yes
Roscommon	Yes
Saginaw	No
Sanilac	No
Schoolcraft	No
Shiawassee	No
St. Clair	No
St. Joseph	No
Tuscola	No
Van Buren	No
Washtenaw	No
Wayne	Yes
Wexford	Yes

Telephone Interviews with each Michigan County Register of Deeds Office, March 21-24, 2003.

B

Warranty Deed - Statutory Form

KNOW ALL MEN BY THESE PRESENTS: That JOHN A. GIORDANO AND PAULA GIORDANO, HIS WIFE

whose address is 7581 OLDE STURBRIDGE TRAIL, CLARKSTON, MICHIGAN 48346

Convey(s) and Warrant(s) to STEVE A. DIAZ, A SINGLE MAN

whose address is 72 WEST END, WATERFORD, MICHIGAN 48328

the following described premises situated in the TOWNSHIP of WATERFORD, County of OAKLAND, and State of Michigan, to-wit:

LOT 41 OF LEFFEL'S SUBDIVISION, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 39 ON PLATE PAGE 21, OAKLAND COUNTY RECORDS. 39021

MORE COMMONLY KNOWN AS: 72 WEST END

for the full consideration of THIRTY FOUR THOUSAND 00/100 (\$34,000.00) DOLLARS

subject to EASEMENTS AND RESTRICTIONS OF RECORD, ALSO SUBJECT TO ACTS OR OMISSIONS OF GRANTEE SINCE 8-25-87 BEING THE DATE OF A CERTAIN LAND CONTRACT IN FULFILLMENT OF WHICH THIS DEED IS GIVEN.

Dated this 13th day of SEPTEMBER of 1994

Witnesses:

\$ 7.00 DEED

\$ 2.00 RECONVOLUTION

\$ 37.40 TRANSFER TAX

6 OCT 94 1:30 P.M.

RECEIVED - OAKLAND COUNTY

PAID - RECORDS - OAKLAND COUNTY

Signed and Sealed J. ALLEN, CLERK/REGISTER OF DEEDS

(1.s.)

JOHN A. GIORDANO

(1.s.)

PAULA GIORDANO

(1.s.)

(1.s.)

STATE OF MICHIGAN
COUNTY OF OAKLAND

The foregoing instrument was acknowledged before me this SEPTEMBER 13, 1994, by JOHN A. GIORDANO AND PAULA GIORDANO, HIS WIFE.

DARICA A. GOIK Notary Public
OAKLAND County, Michigan

My Commission Expires: OCTOBER 10, 1995

Drafted by:

JOHN A. GIORDANO

7581 OLDE STURBRIDGE TR.

CLARKSTON, MICHIGAN 48346

Recording Fee: \$10.00

State Transfer Tax: \$37.40

File No. 0-166687

Tax Parcel No. 13-25-429-035

Return To: Grantee

STATE OF
MICHIGAN

REAL ESTATE
TRANSFER TAX

OK - G.K.

EXHIBIT B

c



Metropolitan Title Company

OWNER'S AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF OAKLAND) SS

COMMITMENT NO. 0-166687

The undersigned, being first duly sworn, deposes and says as follows:

1. That Affiant is the owner of certain premises described in Commitment No. 0-166687, and has not filed, nor is subject to, any bankruptcy, receivership, or insolvency proceedings.

2. That the Affiant is in possession of said property and there are no other parties in possession or claiming rights of possession, except as follows:

NONE

3. That Affiant has no knowledge of any unrecorded water, mineral, gas or oil rights unrecorded easements or claims of easements, boundary line disputes or claims of such grants or rights relative thereto except as follows:

NONE

4. That there are no proceedings instituted or undertaken by anyone which will result in a lien or special assessment upon the premises. There are no delinquent taxes, special assessments, water bills, utility bills, or Homeowner's Association fees covering subject property except as follows:

NONE

5. That there have been no improvements made nor labor or materials furnished to the premises within the last 90 days except as follows:

NONE

6. That Affiant has no knowledge of any other matters affecting the title including but not limited to: mortgages, liens, land contracts options or other encumbrances other than as reflected on METROPOLITAN TITLE COMPANY Commitment No. 0-166687, with an effective date of 08-18-94, except as follows:

NONE

Affiant understands and agrees that this affidavit is made for the purpose of inducing METROPOLITAN TITLE COMPANY to issue a policy or policies of title insurance on behalf of the underwriter named in the commitment. Affiant further agrees that in the event it is determined there are unpaid charges which were due and payable prior to and including the date of closing, and which are the responsibility and obligation of the Affiant, that the Affiant shall pay any and all amounts so charged and shall provide proof of payment of same to METROPOLITAN TITLE COMPANY.

By: STEVEN A. DIAZ

Corporation/Partnership

By: _____

Its: _____

Subscribed and sworn to before me this 13th day of SEPTEMBER, 19 94.

EXHIBIT C

My Commission Expires:

DARICA A. GOIK

OCTOBER 10, 1995

Notary Public OAKLAND County, MI